



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 123, 131, 233, 501

[EPA-HQ-OW-2014-0461; FRL-9930-57-OW]

Revised Interpretation of Clean Water Act Tribal Provision

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed interpretive rule; request for comments.

SUMMARY: Waters on the majority of Indian reservations do not have water quality standards under the Clean Water Act to protect human health and the environment. Only 40 of over 300 federally recognized tribes with reservations have completed the process of obtaining EPA's approval to be treated in a manner similar to a state (TAS), and adopting standards for their waters that EPA has approved. EPA proposes to streamline how tribes apply for TAS for the water quality standards program and other Clean Water Act regulatory programs. The proposal would reduce the burden on applicant tribes and advance cooperative federalism by facilitating tribal involvement in the protection of reservation water quality as intended by Congress. Since 1991, EPA has followed a cautious approach that requires applicant tribes to demonstrate inherent authority to regulate waters and activities on their reservations under principles of federal Indian common law. The Agency has consistently stated that its approach was subject to change in the event of further congressional or judicial guidance addressing tribal authority under section 518 of the Clean Water Act. Having received such guidance, EPA proposes to conclude definitively that section 518 includes an express delegation of authority by Congress to

eligible Indian tribes to administer regulatory programs over their entire reservations. This reinterpretation would eliminate the need for applicant tribes to demonstrate inherent authority to regulate under the Act, thus allowing tribes to implement the congressional delegation of authority unhindered by requirements not specified in the statute. The reinterpretation would also bring EPA's treatment of tribes under the Clean Water Act in line with EPA's treatment of tribes under the Clean Air Act, which has similar statutory language addressing tribal regulation of Indian reservation areas. This action would not revise any regulatory text. Regulatory provisions would remain in effect requiring tribes to identify the boundaries of the reservation areas over which they seek to exercise authority and allowing the adjacent state(s) to comment to EPA on an applicant tribe's assertion of authority. As a streamlining step, the proposed interpretive rule would have no significant cost.

DATES: EPA must receive comments on this proposal on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. EPA will discuss this proposed rule and answer questions about it in a webinar during the above comment period. If you are interested, see EPA's website at

<http://water.epa.gov/scitech/swguidance/standards/wqslibrary/tribal.cfm> for the date and time of the webinar and instructions on how to register and participate. Additionally, under the Paperwork Reduction Act, any comments on the information collection provisions of this proposal are best assured of having full effect if the Office of Management and Budget receives a copy of your comments on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OW-2014-0461, by one of the following methods:

- <http://www.regulations.gov>: Follow the online instructions for submitting comments.
- *Email:* ow-docket@epa.gov.
- Fax: 202-566-0409
- *Mail:* Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Ave., NW, Washington, DC 20460. Attention: Docket ID No. EPA–HQ–OW–2014–0461. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: Desk Officer for EPA, 725 17th St. NW, Washington, DC 20503.
- *Hand Delivery:* EPA Docket Center, EPA West Room 3334, 1301 Constitution Ave., NW, Washington, DC 20004, Attention: Docket ID No. EPA–HQ–OW–2014–0461. Such deliveries are only accepted during the Docket’s normal hours of operation. Please make special arrangements for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OW–2014–0461. EPA’s policy is to include all comments received in the public docket without change and make them available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or email. The <http://www.regulations.gov> website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through <http://www.regulations.gov>, your email address will be automatically captured and included as

part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disc you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA might not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available (e.g., CBI or other information whose disclosure is restricted by statute). Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at the Office of Water Docket Center, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744; the telephone number for the Office of Water Docket Center is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: Fred Leutner, Standards and Health Protection Division, Office of Science and Technology (4305T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, DC 20460; telephone number: (202) 566-0378; fax number: (202) 566-0409; email address: TASreinterpretation@epa.gov.

SUPPLEMENTARY INFORMATION: This supplementary information section is organized as follows:

- I. General Information
 - A. Does This Action Apply to Me?

- B. What Should I Consider as I Prepare My Comments for EPA?
 - 1. Resubmitting Relevant Comments from Consultations and Listening Sessions
 - 2. Submitting CBI
 - 3. Tips for Preparing Your Comments
- II. What is the Statutory and Regulatory History of the CWA TAS Provision?
 - A. Statutory History
 - B. Regulatory History
- III. How Did EPA Interpret the CWA TAS Provision When Establishing TAS Regulations for CWA Regulatory Programs?
- IV. What Developments Support EPA's Proposed Statutory Reinterpretation?
 - A. Relevant Congressional, Judicial and Administrative Developments
 - B. EPA and Tribal Experience in Processing TAS Applications for CWA Regulatory Programs
 - C. Request for Reinterpretation from Tribes
- V. How Does EPA Propose to Reinterpret the CWA TAS Provision?
 - A. Statement of Proposal
 - B. Geographic Scope of TAS for Regulatory Programs
 - C. Treatment of Tribal Trust Lands
 - D. Tribal Criminal Enforcement Authority
 - E. Special Circumstances
 - F. Tribal Inherent Regulatory Authority
 - G. Existing Regulatory Requirements
- VI. How Would the Proposed Change in Interpretation Affect Existing EPA Guidance to Tribes Seeking to Administer CWA Regulatory Programs?
- VII. What Are the Anticipated Effects of the Proposed Reinterpretation?
 - A. Effects on Tribes that EPA Has Previously Found Eligible for TAS
 - B. Effects on New Tribal Applications
 - C. Effects on EPA-Approved State Programs
- VIII. Economic Analysis
- IX. Statutory and Executive Order Reviews
 - A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
 - B. Paperwork Reduction Act (PRA)
 - C. Regulatory Flexibility Act (RFA)
 - D. Unfunded Mandates Reform Act (UMRA)
 - E. Executive Order 13132: Federalism
 - F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments
 - G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks
 - H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
 - I. National Technology Transfer and Advancement Act (NTTAA)
 - J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

I. General Information

A. Does This Action Apply to Me?

This action applies to tribal governments that seek eligibility to administer regulatory programs under the Clean Water Act (CWA, or the Act). The table below provides examples of entities that could be affected by this action or have an interest in it.

Category	Examples of potentially affected or interested entities
Tribes	Federally recognized tribes with reservations that could potentially seek eligibility to administer CWA regulatory programs, and other interested tribes.
States	States adjacent to potential applicant tribes.
Industry	Industries discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.
Municipalities	Publicly owned treatment works or other facilities discharging pollutants to waters within or adjacent to reservations of potential applicant tribes.

If you have questions regarding the effect of this proposed action on a particular entity, please consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Resubmitting Relevant Comments from Consultations and Listening Sessions.* EPA held multiple consultations and listening sessions with tribes and states concerning the issue addressed in this proposed action, and considered views and comments received from these sessions in developing this proposal. The proposed rule has evolved from the materials EPA shared at the time. Therefore, if you submitted comments based on these sessions and wish for EPA to consider them as part of the public comment opportunity for this proposed action, you must resubmit your comments to EPA in accordance with the instructions outlined in this document.

2. *Submitting CBI.* Do not submit CBI information to EPA through <http://www.regulations.gov> or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disc that you mail to EPA, mark the outside of the disc as CBI and then identify electronically within the disc the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. EPA will not disclose information so marked except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

3. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the proposed action by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Explain why you agree or disagree, suggest alternatives, and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Submit your comments by the date shown in the **DATES** section of this notice.

II. What is the Statutory and Regulatory History of the CWA TAS Provision?

A. Statutory History

Congress added CWA section 518, 33 U.S.C. 1377, as part of amendments made in 1987. Section 518(e) authorizes EPA to treat eligible Indian tribes in the same manner as it treats states for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA funding authorities. Section 518(e) is commonly known as the “TAS” provision, for treatment in a similar manner as a state.

Section 518(e) establishes eligibility criteria for TAS, including requirements that the tribe have a governing body carrying out substantial governmental duties and powers; that the functions to be exercised by the tribe pertain to the management and protection of water resources within the borders of an Indian reservation; and that the tribe be reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and applicable regulations. Section 518(e) also requires EPA to promulgate regulations specifying the TAS process for applicant tribes. See section II.B.

Section 518(h) defines “Indian tribe” to mean any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation. It defines “federal Indian reservation” to mean all land within the limits of any reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

B. Regulatory History

Pursuant to section 518(e), EPA promulgated several final regulations establishing TAS criteria and procedures for Indian tribes interested in administering programs under the Act. The

relevant regulations addressing TAS requirements for the principal CWA regulatory programs are:

- 40 CFR 131.8 for section 303(c) water quality standards (WQS). Final rule published December 12, 1991 (56 FR 64876); proposed rule published September 22, 1989 (54 FR 39098). Referred to hereafter as the “1991 WQS TAS rule” or “1991 TAS rule”;
- 40 CFR 131.4(c) for section 401 water quality certification, published in the 1991 WQS TAS rule;
- 40 CFR 123.31-34 for section 402 National Pollutant Discharge Elimination System (NPDES) permitting and other provisions, and 40 CFR 501.22-25 for the state sewage sludge management program. Final rule published December 22, 1993 (58 FR 67966); proposed rule published March 10, 1992 (57 FR 8522); and
- 40 CFR 233.60-62 for section 404 dredge or fill permitting. Final rule published February 11, 1993 (58 FR 8172); proposed rule published November 29, 1989 (54 FR 49180).

In 1994, EPA amended the above regulations to simplify the TAS process and eliminate unnecessary and duplicative procedural requirements. *See* 59 FR 64339 (December 14, 1994) (the “Simplification Rule”). For example, the Simplification Rule eliminated the need for a tribe to prequalify for TAS before applying for section 402 and section 404 permitting programs. Instead, the rule provided that a tribe would establish its TAS eligibility at the program approval stage, subject to EPA’s notice and comment procedures already established for state program approvals in 40 CFR parts 123 and 233. The rule retained the prequalification requirements (including local notice and comment procedures) for section 303(c) WQS and section 401 water

quality certifications. *Id.*; *see also*, 40 CFR 131.8(c)(2), (3).¹ The TAS regulations for CWA regulatory programs have remained intact since promulgation of the Simplification Rule.

This proposed action would not address or affect the TAS requirements or review process for tribes to receive grants.² The receipt of grant funding does not involve any exercise of regulatory authority. Therefore, a determination of TAS eligibility solely for funding purposes does not, under existing regulations, require an analysis or determination regarding an applicant tribe's regulatory authority.

III. How Did EPA Interpret the CWA TAS Provision When Establishing TAS Regulations for CWA Regulatory Programs?

In the 1991 WQS TAS rule, which addressed TAS for the WQS and certification programs, EPA explained that tribes must meet four criteria to be approved for TAS eligibility. Specifically, an applicant tribe must: (1) be federally recognized, (2) carry out substantial governmental duties and powers over a "Federal Indian reservation" as defined in CWA section 518(h)(1), (3) have appropriate authority to regulate the quality of reservation waters, and (4) be reasonably expected to be capable of administering the CWA program. 54 FR at 39101.

The third of the criteria – regulatory authority – is the sole focus of the proposed change in statutory interpretation. This proposal would not affect the other TAS criteria or tribal application requirements relating to those criteria.

¹ Under the CWA and EPA's regulations, tribes can apply for TAS under CWA section 518 for the purpose of administering WQS and simultaneously submit actual standards for EPA review under section 303(c). Although they can proceed together, a determination of TAS eligibility and an approval of actual water quality standards are two distinct actions.

² EPA has promulgated regulations governing the TAS application and review requirements for CWA grant funding programs. *See, e.g.*, 40 CFR 35.580-588 (CWA section 106 water pollution control funding); 40 CFR 35.600-615 (CWA section 104 water quality cooperative agreements and wetlands development funding); 40 CFR 35.630-638 (CWA section 319 nonpoint source management grants).

With regard to regulatory authority,³ EPA carefully analyzed section 518 and the then-current state of judicial precedent to assess whether Congress had intended to delegate regulatory authority to eligible Indian tribes to administer CWA regulatory programs throughout their entire reservations, including over lands owned by nonmembers of the tribe within a reservation. 56 FR at 64879-81. EPA noted significant support in the CWA and its legislative history for the conclusion that Congress had in fact delegated such authority. *Id.* Section 518(e) requires only that the functions to be exercised by the applicant Indian tribe pertain to the management and protection of water resources that are “within the borders of an Indian reservation.” Section 518(h)(1) expressly defines Indian reservations as “all land within the limits of any Indian reservation...notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.”

EPA specifically noted the import of language in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 428 (1989), where Justice White (with three additional Justices joining) identified CWA sections 518(e) and (h)(1) as an express delegation of authority to tribes, including authority over the activities of non-tribal members on their lands within a reservation. 56 FR at 64879-80. EPA agreed with commenters on the proposed rule that Justice White’s opinion indicated that at least four Supreme Court Justices would interpret the plain language of section 518 as an express delegation of regulatory authority. *Id.*

At the same time EPA recognized that Justice White’s opinion was not a majority opinion of the Supreme Court (the other five Justices did not opine on the issue) and that the interpretation of CWA section 518 was not actually before the Court in *Brendale*. *Id.* EPA also noted that while there were significant statements in the legislative history of section 518 supporting

³ Tribal “regulatory authority” in this proposal refers to civil regulatory authority. See section V.D. for a discussion of tribal criminal enforcement authority.

congressional intent to delegate authority to eligible tribes, the legislative history standing alone was insufficiently clear to confirm definitively such intent. *Id.* at 64879-81. EPA was also mindful that three members of Congress had submitted comments in connection with the proposed TAS rule stating their respective views that Congress did not intend to expand the scope of tribal authority over non-Indians on the reservation by passage of section 518. *Id.* Although EPA observed that subsequent statements by members of Congress must be treated cautiously and do not supplement the statute's legislative history, EPA carefully considered the commenters' views in forming its initial approach to tribal regulatory authority under the CWA.

Ultimately, EPA took a cautious approach in the 1991 TAS rule and stated it would await further congressional or judicial guidance on the extent to which section 518 is properly interpreted as an express congressional delegation of authority. *Id.* at 64877-81. EPA specifically stated the Agency's interpretation that in section 518, Congress had expressed a preference for tribal regulation of surface water quality on reservations to ensure compliance with the goals of the CWA. *Id.* at 64878-79. However, until such time as EPA revisited the issue, the Agency determined it would require applicant Indian tribes to demonstrate, on a case-by-case basis, their inherent authority under existing principles of federal Indian law to regulate activities under the CWA. *Id.* at 64880-81.

EPA's approach required an applicant tribe to demonstrate its inherent tribal authority over the activities of non-tribal members on lands they own in fee within a reservation ("nonmember fee lands") under the principles of *Montana v. United States*, 450 U.S. 544 (1981), and its progeny. *Montana* held that absent a federal grant of authority, tribes generally lack inherent jurisdiction over nonmember activities on nonmember fee lands, but retain inherent civil jurisdiction over nonmember activities within the reservation where (i) nonmembers enter into

“consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements” or (ii) “... [nonmember] conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 565-566; the “*Montana* test.”

EPA noted that in applying the second prong of the *Montana* test and assessing the impacts of nonmember activities on a tribe, EPA will rely upon an operating rule that evaluates whether the potential impacts of regulated activities on the tribe are serious and substantial. 56 FR at 64878-79. EPA recognized that the analysis of whether the *Montana* test is met in a particular situation depends on the specific circumstances presented by the tribe’s application. *Id.* at 64878. Thus, EPA’s approach to the second prong of the *Montana* test involves a fact-specific inquiry to determine whether the tribe has shown that existing and potential nonmember activities within the reservation affecting water quality have or could have serious and substantial direct impacts on the political integrity, economic security, or health or welfare of the tribe.

EPA adopted an identical approach and reasoning regarding tribal inherent regulatory authority in its subsequent TAS regulations (see list of regulations in section II.B). In these rules, EPA restated that the question of whether section 518 delegated authority to tribes to administer CWA regulatory programs on their reservations was unresolved and remained subject to additional consideration in light of subsequent congressional or judicial guidance. *See, e.g.*, 58 FR at 8173-76; 58 FR at 67971, 67975-76.

IV. What Developments Support EPA's Proposed Statutory Reinterpretation?

A. Relevant Congressional, Judicial and Administrative Developments

EPA has taken final action approving TAS for CWA regulatory programs for 50 tribes since the 1991 WQS TAS rule.⁴ Three of those decisions were challenged in judicial actions. The last challenge concluded in 2002. In each of the cases, the reviewing court upheld EPA's determination with respect to the applicant tribe's inherent authority to regulate under the CWA. *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002) (Sokaogon Chippewa Community); *Montana v. EPA*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998) (Confederated Salish and Kootenai Tribes of the Flathead Reservation); *Montana v. EPA*, 141 F.Supp.2d 1259 (D. Mont. 1998) (Assiniboine and Sioux Tribes of the Fort Peck Reservation).⁵

As noted in section III's discussion of the 1991 TAS rule, EPA was mindful of the statement in *Brendale* indicating that Justice White and the three other Supreme Court Justices joining his plurality opinion viewed CWA section 518 as an express congressional delegation of authority to Indian tribes. 56 FR at 64889 (citing *Brendale*, 492 U.S. at 428). EPA also recognized, however, that the statement regarding section 518 was not necessary to the plurality's decision; nor was it based on an analysis of the relevant CWA legislative history, which, as EPA noted, was inconclusive on the issue. *Id.* EPA thus opted to proceed with a cautious initial approach to tribal regulatory authority under the CWA, and await further developments that could guide the proper interpretation of section 518.

⁴ The site <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvable.cfm> provides a list of tribes approved for section 303(c) water quality standards and section 401 water quality certification. To date, EPA has not approved TAS for any tribe for CWA section 402 or section 404 permitting.

⁵ EPA was also upheld in the only case challenging the Agency's approval of actual tribal water quality standards under CWA section 303(c) (which is a distinct action from EPA's approval of tribal TAS eligibility under section 518). *City of Albuquerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (water quality standards of Isleta Pueblo).

Since the 1991 TAS rule, there have been significant developments supporting the interpretive change EPA proposes. Notably, the first court to review a challenge to an EPA CWA TAS approval expressed the view that the statutory language of section 518 indicated plainly that Congress intended to delegate authority to Indian tribes to regulate their entire reservations, including regulation of non-Indians on fee lands within a reservation. *Montana v. EPA*, 941 F. Supp. 945, 951-52 (D. Mont. 1996), *aff'd*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998). In that case, the applicant tribe, participating as amicus, argued that the definition of “federal Indian reservation” in CWA section 518(h)(1) – which expressly includes all land within the limits of a reservation notwithstanding the issuance of any patent – combined with the bare requirement of section 518(e) that the functions to be exercised by the applicant tribe pertain to reservation water resources, demonstrates that section 518 provides tribes with delegated regulatory authority over their entire reservations, including over non-Indian reservation lands. *Id.* Because EPA premised its approval of the TAS application at issue upon a showing of inherent tribal authority, it was unnecessary for the district court to reach the delegation issue as part of its holding in the case. Nonetheless, the court readily acknowledged that section 518 is properly interpreted as an express congressional delegation of authority to Indian tribes over their entire reservations. The court noted that the legislative history might be ambiguous, although only tangentially so, since the bulk of the legislative history relates to the entirely separate issue of whether section 518(e) pertains to non-Indian water quantity rights, which it does not. *Id.* The court observed the established principle that Congress may delegate authority to Indian tribes – per *United States v. Mazurie*, 419 U.S. 544 (1975) – and commented favorably on Justice White’s statement regarding section 518 in *Brendale*. *Id.* The court also noted that a congressional delegation of authority to tribes over their entire reservations

“comports with common sense” to avoid a result where an interspersed mixing of tribal and state WQS could apply on a reservation depending on whether the waters traverse or bound tribal or non-Indian reservation land. *Id.* Having thus analyzed CWA section 518, the court concluded – albeit in dicta – that Congress had intended to delegate such authority to Indian tribes over their entire reservations.

The TAS provision of a separate statute – the Clean Air Act (CAA) – provides additional relevant insight into congressional intent. Congress added the CAA TAS provision – section 301(d) – to the statute in 1990, only three years after it enacted CWA section 518. Although CAA section 301(d) pre-dates EPA’s 1991 CWA TAS rule, it was not until 1998 that EPA promulgated its regulations interpreting the CAA TAS provision as an express congressional delegation of authority to eligible Indian tribes. The U.S. Court of Appeals for the D.C. Circuit upheld that interpretation two years later. *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000) (“*APS*”), *cert. denied*, 532 U.S. 970 (2001). Viewed in light of the court’s careful review, the CAA TAS provision provides useful guidance regarding Congress’ understanding of the importance of uniform tribal regulation of mobile environmental pollutants within reservations. Further, that understanding can fairly be traced back to the 1987 enactment of CWA section 518. Each statute must, of course, be viewed in light of its own language and history. Relevant aspects of EPA’s interpretation of the CAA TAS provision are described below.

EPA finalized its regulations implementing CAA section 301(d) in 1998. 40 CFR part 49; 63 FR 7254 (February 12, 1998) (the “CAA Tribal Authority Rule”). The CAA TAS provision, combined with the definition of Indian tribe in CAA section 302(r), established the same basic TAS eligibility criteria for CAA purposes that apply under the CWA: *i.e.*, federal recognition,

tribal government carrying out substantial duties and powers, jurisdiction, and capability. With regard to jurisdiction, EPA carefully analyzed the language and legislative history of the relevant portion of the CAA TAS provision, CAA section 301(d)(2)(B), and concluded that Congress had intended to delegate authority to eligible Indian tribes to administer CAA regulatory programs over their entire reservations irrespective of land ownership – *e.g.*, including over nonmember fee lands within the reservation. 63 FR at 7254-57. EPA determined that the language of the provision distinguished between reservation and non-reservation areas over which tribes could seek TAS eligibility and plainly indicated Congress’ intent that reservations will be under tribal jurisdiction. *Id.* By contrast, for non-reservation areas tribes would need to demonstrate their inherent authority to regulate under principles of federal Indian law. *Id.*

EPA noted at that time important similarities between the CAA and CWA TAS provisions. Most notably, the tribal provisions of both statutes expressly provided eligibility for tribal programs that pertain to the management and protection of environmental resources (*i.e.*, air and water, respectively) located on Indian reservations. *Id.* at 7256. For instance, CAA section 301(d) provides for tribal regulation of air resources “within the exterior boundaries of the reservation” without any requirement for a demonstration by applicant tribes of separate authority over such reservation areas. CAA section 301(d)(2)(B). Similarly, CWA section 518 provides eligibility for tribal programs covering water resources “within the borders of an Indian reservation” and expressly defines Indian reservations to include all land within the reservation notwithstanding the issuance of any patent and including rights-of-way. CWA sections 518(e)(2), (h)(1). By their plain terms, both statutes thus treat reservation lands and resources the same way and set such areas aside for tribal programs. At the time EPA promulgated the CAA Tribal Authority Rule, however, EPA viewed the CAA – which also contained other provisions addressing tribal roles –

and its legislative history as more conclusively demonstrating congressional intent to delegate authority to eligible tribes over their reservations. *Id.* EPA recognized that this resulted in different approaches to two similar TAS provisions and reiterated that the question remained as to whether the CWA provision is also an express delegation of authority to eligible tribes. *Id.* EPA also cited to the district court decision in *Montana v. EPA*, which, as noted above, concluded that CWA section 518 plainly appears to delegate such authority to Indian tribes. *Id.*

Several parties petitioned for judicial review of the CAA Tribal Authority Rule and challenged whether CAA section 301(d) could be properly interpreted as a delegation of authority by Congress to eligible Indian tribes. *APS*, 211 F.3d at 1287-92. The D.C. Circuit carefully analyzed CAA section 301(d), the relevant legislative history, and the judicial precedent on delegations of authority to Indian tribes and concluded that EPA's interpretation comported with congressional intent. *Id.* The court acknowledged the similarities between the CAA and CWA TAS provisions, as well as EPA's different approach under the CWA. *Id.* at 1291-92. However, the court also noted with significance that EPA's approach under the CWA had not been subjected to judicial review and observed favorably the district court's statements in *Montana v. EPA* that section 518 plainly indicates congressional intent to delegate authority to Indian tribes. *Id.* Ultimately, the D.C. Circuit recognized that EPA had taken a cautious approach under the CWA but that there was no reason EPA must do so again under the CAA. *Id.*

A dissenting judge in the *APS* case disagreed that CAA section 301(d)(2)(B) expressed congressional intent to delegate authority to tribes over their reservations. *Id.* at 1301-05. Notably, the dissent's view was predicated largely on the absence in section 301(d)(2)(B) of language explicitly describing the reservation areas over which tribes would exercise CAA jurisdiction as including *all* reservation lands *notwithstanding the issuance of any patent and*

including rights-of-way running through the reservation (emphasis added). *Id.* The dissent viewed this language as critical to an expression of congressional intent that tribes are to exercise delegated authority over all reservation lands, including lands owned by nonmembers of the tribes. *Id.* And in the absence of such language – which the dissent referred to as “the gold standard for such delegations” – the dissent did not view CAA section 301(d)(2)(B) as expressing Congress’ intent to relieve tribes of the need to demonstrate their inherent authority to regulate under the CAA, including a demonstration of inherent authority over nonmember activities on fee lands under the Supreme Court’s *Montana* test. *Id.* at 1303-04.⁶ Notably, the dissent observed that the key “notwithstanding” language is, in fact, included in the relevant tribal provisions of the CWA – *i.e.*, in the definition of “federal Indian reservation” in CWA section 518(h)(1). *Id.* at 1302 (referencing *Brendale*, 492 U.S. at 428). The dissent noted that in spite of the statement in *Brendale*, EPA had determined not to treat CWA section 518 as a congressional delegation; however, the dissent also observed that no court had yet resolved the issue. *Id.*

As the D.C. Circuit stated in *APS*, no court has yet reviewed EPA’s interpretation of tribal regulation under the CWA on the question of whether CWA section 518 constitutes an express delegation of authority from Congress to eligible Indian tribes to regulate water resources throughout their reservations. Importantly, members of the three courts that have considered the issue have favorably viewed such an interpretation: The U.S. Supreme Court in *Brendale*, the federal district court in *Montana v. EPA*, and the D.C. Circuit in *APS*.

⁶ The dissent in *APS* also concluded that a separate provision of the CAA – section 110(o) – expressly delegates authority to eligible Indian tribes over their entire reservations for the specific CAA program established in that provision. *Id.* at 1301-02. Section 110(o) includes the key language cited by the dissent as indicative of express congressional delegations of authority to tribes over their reservations. *Id.*

In light of these developments, as well as EPA's experience administratively interpreting and implementing the CAA TAS provision, it is appropriate to revisit and revise EPA's approach to TAS under the CWA. In the preambles to the CWA TAS regulations from the 1990s, EPA discussed the possibility of reinterpreting CWA section 518 as an express congressional delegation of authority to tribes based on subsequent congressional or judicial guidance. The proposed action would accomplish such a reinterpretation.

B. EPA and Tribal Experience in Processing TAS Applications for CWA Regulatory Programs

Based on EPA's experience to date, the TAS application process has become significantly more burdensome than EPA anticipated in 1991. Many authorized tribes have informed EPA that the demonstration of inherent tribal authority, including application of the *Montana* test, constituted the single greatest administrative burden in their application processes.

In the 1991 TAS rule, EPA expressed its expert view that given the importance of surface water to tribes and their members, the serious nature of water pollution impacts, and the mobility of pollutants in water, applicant Indian tribes would generally be able to demonstrate inherent regulatory authority to set WQS for reservation waters, including as applied to nonmembers on fee lands under federal Indian law principles. *Id.* at 64877-79. In light of the Agency's generalized findings regarding the relationship of water quality to tribal health and welfare, EPA noted that a tribe could likely meet the *Montana* test by making a relatively simple factual showing that (1) there are waters within the subject reservation used by the tribe or its members, (2) the waters are subject to protection under the CWA, and (3) impairment of the waters by nonmember activities on fee lands would have serious and substantial effects on tribal health and welfare. *Id.* at 64879.

EPA thus anticipated in the early 1990s that applicant tribes would face a relatively simple initial burden of supplying basic facts to demonstrate that they retain requisite inherent authority to regulate under the CWA – including regulation of nonmember activities on fee lands – under established federal Indian law principles. *Id.*

Unfortunately, EPA's expectations have not, as a general matter, been realized. Although each TAS application has varied according to the particular facts and circumstances of the applicant tribe and its reservation, the general experience confirms that demonstrations of inherent regulatory authority continue to impose unintended administrative hurdles on applicant tribes and to require substantial commitments of limited tribal and federal resources. In particular, the demonstration of inherent authority over nonmember activities on the reservation under the so-called *Montana* test has created the most significant and widespread burden and at the same time provides no information necessary for EPA's oversight of the regulatory program. Tribes have repeatedly expressed their concern that the demonstration of inherent authority on a case-by-case basis is challenging, time consuming and costly. EPA's information on the 50 tribes that it has found eligible to administer WQS and section 401 certifications indicates that tribal applications for reservations with nonmember fee lands, which require an analysis of tribal inherent authority under *Montana*, took 1.6 years longer to be approved, on average, than applications for reservations without such lands.

The elimination of such unintended administrative burdens does not, in itself, provide a legal rationale to alter EPA's interpretation of section 518. However, streamlining a TAS process that has become unnecessarily restrictive and burdensome does offer a strong policy basis for the Agency to take a careful second look at that provision and to consider – as it contemplated as early as 1991 – whether intervening events have shed additional light on the appropriate statutory

interpretation. Eliminating such unnecessary burdens is consistent with longstanding EPA and Executive policy to support tribal self-determination and promote and streamline tribal involvement in managing and regulating their lands and environments. *See, e.g.*, Executive Order 13175 (65 FR 67249, November 9, 2000); Presidential Memorandum: Government-to-Government Relations with Native American Tribal Governments (59 FR 22951, April 29, 1994); EPA Policy for the Administration of Environmental Programs on Indian Reservations (November 8, 1984).

As explained in section III, EPA has long interpreted the CWA as expressing Congress' preference for tribal regulation of reservation surface water quality. *See, e.g.*, 56 FR at 64878. As explained in section IV, developments subsequent to the 1991 TAS rule definitively confirm that section 518 includes an express delegation of authority by Congress to eligible tribes to regulate water resources under the CWA throughout their entire reservations.

C. Request for Reinterpretation from Tribes

In April 2013, the National Tribal Water Council⁷ expressed its concern in a document submitted to EPA's Office of Water⁸ that "[c]urrently, EPA does not treat tribes and states in the same manner even though it has the authority to do so under section 518(e)(2) of the CWA." The Council further stated that "reliance on a jurisdictional showing before granting tribal regulatory authority has prevented many tribes from establishing federally approved WQS for the waters of their reservations. This has left a significant portion of Native American communities without the protection of the CWA to safeguard their water resources." The Council encouraged EPA to consider reinterpreting the CWA TAS provision as an express delegation of congressional

⁷ For more information on the National Tribal Water Council, see <http://nationaltribalwatercouncil.org/>.

⁸ *Equal Treatment for Tribes in Seeking Eligibility under EPA Regulatory Programs*, unsigned undated document, National Tribal Water Council, provided to the Office of Water in April 2013. Available at the above site.

authority as it did with the similar provision of the CAA and to remove the requirement for tribes to show their inherent authority.⁹

V. How Does EPA Propose to Reinterpret the CWA TAS Provision?

A. Statement of Proposal

Based on the analysis in sections III and IV above, EPA proposes to revise its interpretation of CWA section 518 and conclude definitively that Congress expressly delegated authority to Indian tribes to administer CWA regulatory programs over their entire reservations, including over nonmember activities on fee lands within the reservation of the applicant tribe, subject to the eligibility requirements in section 518. In doing so, EPA thus proposes to exercise the authority entrusted to it by Congress to implement the CWA TAS provision.

EPA's revised interpretation is, most importantly, expressed in the language of section 518. Section 518(e)(2) requires only that the functions to be exercised by the applicant Indian tribe pertain to the management and protection of water resources "within the borders of an Indian reservation." Section 518(h)(1) then defines the term "federal Indian reservation" to include all lands within the limits of any Indian reservation notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. That definition is precisely the same language that the dissent in *APS* stated is the "gold standard" for an express congressional delegation of regulatory authority to tribes over their entire reservations. *APS*, 211 F.3d at 1302-03. It is also the language that the U.S. Supreme Court reviewed in finding congressional delegations to tribes in other contexts. *United States v. Mazurie*, 419 U.S. 544 (1975) (delegation of authority to tribes regarding regulation of liquor); *Rice v. Rehner*, 463 U.S. 713 (1983) (same).

⁹ In addition to demonstrating their inherent regulatory authority, a number of tribes that have previously applied for TAS to administer CWA regulatory programs have asserted in their applications their view that CWA section 518 constitutes an express delegation of authority from Congress. Although EPA has not previously relied on that approach in its TAS decisions, it is noteworthy that tribes have expressed this legal interpretation in prior applications.

Although the legislative history of section 518 has, of course, remained unaltered since 1987, the plain language of the statute and the above-described developments provide ample support for the revised interpretation.

The effect of this proposal would be to relieve tribes of the need to demonstrate their inherent authority when they apply for TAS to administer CWA regulatory programs. In particular, this proposal would eliminate any need to demonstrate that the applicant tribe retains inherent authority to regulate the conduct of nonmembers of the tribe on fee lands under the test established by the Supreme Court in *Montana*. Instead, applicant tribes would be able to rely on the congressional delegation of authority in section 518 as the source of their authority to regulate their entire reservations under the CWA, without distinguishing among various categories of on-reservation land. As EPA explained in connection with the CAA, such a territorial approach that treats Indian reservations uniformly promotes rational, sound management of environmental resources that might be subjected to mobile pollutants that disperse over wide areas without regard to land ownership. *See* 59 FR at 43959. As specifically recognized by the district court in *Montana v. EPA*, the same holds true for regulation under the CWA. *Montana*, 941 F. Supp. at 952.

B. Geographic Scope of TAS for Regulatory Programs

EPA's proposal would not affect – either by expanding or contracting – the geographic scope of potential tribal TAS eligibility under the CWA. Under section 518, tribes can only obtain TAS status over waters within the borders of their reservations. *See, e.g.*, 56 FR at 64881-82. Thus, under any approach to tribal regulatory authority under the CWA, tribal TAS eligibility under the CWA is limited to Indian reservations. Tribes can seek TAS with respect to water resources pertaining to any type of on-reservation land, including, for example, reservation land

held in trust by the United States for a tribe, reservation land owned by or held in trust for a member of the tribe, and reservation land owned by non-tribal members. Conversely, tribes cannot obtain TAS under the CWA for water resources pertaining to any non-reservation Indian country¹⁰ or any other type of non-reservation land.¹¹ The proposed change in interpretation would not alter that basic limitation of TAS under the CWA.

C. Treatment of Tribal Trust Lands

The proposed change in statutory interpretation would not alter the current approach to tribal trust lands. Indian reservations include trust lands validly set aside for Indian tribes even if such lands have not formally been designated as an Indian reservation. Many named Indian reservations were established through federal treaties with tribes, federal statutes, or Executive Orders of the President. Such reservations are often referred to as formal Indian reservations. Many tribes have lands that the United States holds in trust for the tribes, but that have not been formally designated as reservations. As EPA has consistently stated, and consistent with relevant judicial precedent, such tribal trust lands are informal reservations and thus have the same status as formal reservations for purposes of the Agency's programs. *See, e.g.*, 56 FR at 64881; 63 FR at 7257-58; *APS*, 211 F.3d at 1292-94. For CWA purposes, tribes have thus always been able to seek TAS over such trust lands, and would continue to be able to do so under this proposal.

Several tribes have done so previously.

¹⁰ Indian country is defined at 18 U.S.C. 1151 as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Indian reservations are thus a subset of the broader geographic area that comprises Indian country as a whole.

¹¹ Many tribes have rights to hunt, fish, gather resources, or perform other activities in areas outside of their reservations. To the extent the lands on which these rights are exercised are not Indian reservation lands as defined at 18 U.S.C. 1151(a), tribes cannot obtain TAS under the CWA for water resources pertaining to such lands.

D. Tribal Criminal Enforcement Authority

EPA's proposed change in statutory interpretation would not affect any existing limitations on tribal criminal enforcement authority. This proposal relates solely to applicant Indian tribes' civil regulatory authority to administer CWA regulatory programs on their reservations; it does not address or in any way alter the scope of tribal criminal enforcement jurisdiction. EPA has previously established regulations addressing implementation of criminal enforcement authority on Indian reservations for those CWA programs that include potential exercises of such authority. *See, e.g.*, 40 CFR 123.34, 233.41(f). These regulations provide that the federal government will retain primary criminal enforcement responsibility in those situations where eligible tribes do not assert or are precluded from exercising such authority.

E. Special Circumstances

There could be rare instances where special circumstances limit or preclude a particular tribe's ability to accept or effectuate the congressional delegation of authority over its reservation. For example, there could be a separate federal statute establishing unique jurisdictional arrangements for a specific state or a specific reservation that could affect a tribe's ability to exercise authority under the CWA. It is also possible that provisions in particular treaties or tribal constitutions could limit a tribe's ability to exercise relevant authority.¹²

The application requirements of existing CWA TAS regulations already require tribes to submit a statement of their legal counsel (or equivalent official) describing the basis for their assertion of authority. The statement can include copies of documents such as tribal

¹² EPA takes no position in this proposal regarding whether any particular tribe or Indian reservation is subject to any potential impediment relating to the effectuation of the congressional delegation of regulatory authority or how the CWA can be interpreted vis-à-vis the alleged source of any such impediment. Any such issue would need to be addressed on a case-by-case basis and with the benefit of a full record of relevant information that would be developed during the processing of a particular TAS application. To the extent EPA is ever called upon to make a decision regarding this type of issue, such a decision would be rendered in the context of EPA's final action on a specific TAS application, and any judicial review of that decision would occur in that context.

constitutions, by-laws, charters, executive orders, codes, ordinances, resolutions, etc. *See* 40 CFR 131.8(b)(3)(ii); 123.32(c); 233.61(c)(2). If EPA finalizes this proposed action, the requirement for a legal counsel's statement would continue to apply and would ensure that applicant tribes appropriately rely on the congressional delegation of authority and provide any additional information that could be relevant to their ability to accept or effectuate the delegated authority. As described below in section V.G., existing CWA TAS and program regulations will also continue to provide appropriate opportunities for other potentially interested entities – such as states or other Indian tribes adjacent to an applicant tribe – to comment on an applicant tribe's assertion of authority and, among other things, inform EPA of any special circumstances that they believe could affect a tribe's ability to regulate under the CWA.

Section 10211(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 ("SAFETEA"), Public Law 109-59, 119 Stat. 1144 (August 10, 2005) established a unique TAS requirement with respect to Indian tribes located in the State of Oklahoma. Under section 10211(b) of SAFETEA, tribes in Oklahoma seeking TAS under a statute administered by the EPA for the purpose of administering an environmental regulatory program must, in addition to meeting applicable TAS requirements under the EPA statute, enter into a cooperative agreement with the state that is subject to EPA approval and that provides for the tribe and state to jointly plan and administer program requirements. This requirement of SAFETEA exists apart from, and in addition to, existing TAS criteria, including the TAS criteria set forth in section 518 of the CWA. EPA's proposal relates solely to the interpretation of an existing CWA TAS requirement; it would thus have no effect on the separate TAS requirement of section 10211(b) of SAFETEA.

F. Tribal Inherent Regulatory Authority

EPA's proposed change in statutory interpretation is not intended as any comment on the extent of tribal inherent regulatory authority. As the Agency clearly articulated in the TAS rules identified in section II.B, the importance of water resources to tribes, the serious potential impacts of water pollution on tribes' uses of their waters, and the mobility of pollutants in water all strongly support tribes' ability to demonstrate their inherent authority to regulate surface water quality on their reservations, including the authority to regulate nonmember conduct on fee lands under the Supreme Court's test established in *Montana*. Consistent with its 1991 interpretation of section 518, EPA concluded that each of the 50 tribes it has approved for TAS for CWA regulatory programs has demonstrated its inherent regulatory authority and has demonstrated that the functions it sought to exercise pertain to the management and protection of reservation water resources. All Agency CWA TAS determinations challenged in court have been upheld.

The proposed change in interpretation would not affect these prior TAS approvals. The proposed change would, however, modify EPA's approach going forward to be consistent with Congress' intent to delegate authority to eligible tribes. It would relieve tribes of the administrative burden associated with demonstrating their inherent regulatory authority in the TAS application process. The change in interpretation does not, however, alter EPA's prior views regarding the extent of tribal inherent regulatory authority.¹³

¹³ In promulgating the CAA Tribal Authority Rule, the EPA similarly noted its expert view that even absent a direct delegation of authority from Congress, tribes would very likely have inherent authority over all activities within Indian reservation boundaries that are subject to CAA regulation. 59 FR at 43958 n.5.

G. Existing Regulatory Requirements

Because the proposed change in statutory interpretation is consistent with existing CWA TAS regulatory text, EPA's proposal would not revise any regulatory text in the Code of Federal Regulations.

If EPA finalizes its change in interpretation, tribes would be able to rely on the congressional delegation of authority in section 518 as the source of their authority to regulate water quality on their reservations. Aside from any special circumstances (see section V.E.), the main focus in determining the extent of an applicant tribe's jurisdiction for CWA regulatory purposes would then be identifying the geographic boundaries of the Indian reservation area (whether a formal or informal reservation) over which the congressionally delegated authority would apply. EPA's existing CWA TAS regulations already provide for applicant tribes to submit a map or legal description of the reservation area that is the subject of the TAS application. *See* 40 CFR 131.8(b)(3)(i); 123.32(c); 233.61(c)(1); 501.23(c). These provisions would continue to apply and would ensure that each tribe applying for a CWA regulatory program submits information adequate to demonstrate the location and boundaries of the subject reservation.

The existing regulations provide appropriate opportunities for potentially interested entities to provide input to EPA regarding any jurisdictional issues associated with a tribe's TAS application. As mentioned in section II.B. above, EPA's TAS regulations for the CWA section 303(c) WQS program include a process for notice to appropriate governmental entities – states, tribes and other federal entities located contiguous to the reservation of the applicant tribe – and provide an opportunity for such entities to provide comment on the applicant tribe's assertion of authority. EPA makes such notice broad enough that other potentially interested entities can

participate in the process. 56 FR at 64884. For example, EPA routinely publishes notice of tribal TAS applications for the WQS program in relevant local newspapers covering the area of the subject reservation and in electronic media.

EPA's TAS regulations for the CWA section 402 and 404 permitting programs require an analysis of regulatory authority as part of the program approval process under 40 CFR parts 123 and 233 that are described in section II.B. As described in the Simplification Rule, EPA makes its decisions to approve or disapprove those programs as part of a public notice and comment process conducted in the Federal Register. 59 FR at 64340.

Thus, the regulations would continue to afford appropriate opportunities for interested parties to comment on tribal assertions of authority for all CWA regulatory programs. Because the principal jurisdictional issue under the proposed reinterpretation would be the boundaries of the subject reservation, any comments on an applicant tribe's assertion of authority would likely focus on the reservation boundaries.¹⁴ However, to the extent a particular application presents a separate jurisdictional issue, the notice-and-comment process that exists in each CWA TAS regulation would also be available to raise such an issue to EPA for due consideration.

Because this proposal merely explains EPA's revised interpretation of existing statutory requirements established in the CWA tribal provision – and does not propose any changes to the existing regulatory language applicable to CWA TAS applications – an interpretive rule is the appropriate vehicle to announce EPA's revised approach. This interpretive rule is not subject to notice and comment requirements of the Administrative Procedure Act. However, EPA decided

¹⁴ Focusing the jurisdictional inquiry on the geographic scope of a tribe's TAS application – *i.e.*, the boundary of the reservation area that a tribe seeks to regulate – would impose no additional burden on entities that wish to comment on an applicant tribe's assertion of authority. Under any approach to tribal regulatory authority, the geographic scope of the TAS application would be a relevant jurisdictional consideration and thus an appropriate issue for potential comment during the TAS process. Commenters have, at times, raised such geographic issues in the context of previous TAS applications; EPA's proposal would not alter the opportunity to do so for future applications, or any burden attendant to preparing and submitting such comments.

to provide notice and an opportunity for comment to increase transparency and to allow interested parties to provide their views. EPA intends this process to ensure that the Agency's decision making is well informed by stakeholder views and invites comments on all aspects of this proposal to reinterpret section 518 of the CWA as a congressional delegation of authority to eligible tribes.

VI. How Would the Proposed Change in Interpretation Affect Existing EPA Guidance to Tribes Seeking to Administer CWA Regulatory Programs?

As noted in section V.G., EPA's proposal would not revise any regulatory text. However, if EPA finalizes the proposal, the Agency would consider revising and updating some of its existing guidance to tribes and EPA regional offices on implementing the regulations.

For example, a 1998 memorandum to EPA staff (the "Cannon-Perciasepe Memorandum"¹⁵) provided guidance for EPA's reviews of tribal assertions of inherent authority. The memorandum established a case-by-case process for EPA to seek comments from appropriate governmental entities and the public on EPA's proposed factual findings relating to nonmember activities on fee lands. Cannon-Perciasepe Memorandum, p. 6. The memorandum also provided detailed guidance for implementing the *Montana* test. Cannon-Perciasepe Memorandum, Att. C.¹⁶

If EPA finalizes this proposal, the memorandum's *Montana* test guidance would no longer be relevant for TAS applications for CWA regulatory programs, and there would be no need for EPA to develop or seek comment on factual findings relating to tribal inherent authority. EPA

¹⁵ "Adoption of the Recommendations from the EPA Workgroup on Tribal Eligibility Determinations," memorandum from Assistant Administrator for Water Robert Perciasepe and General Counsel Jonathan Z. Cannon to EPA Assistant Administrators and Regional Administrators, March 19, 1998.

¹⁶ The "Cannon-Perciasepe" approach and related guidance to tribes are reflected in subsequent EPA materials, including portions of the "Strategy for Reviewing Tribal Eligibility Applications to Administer EPA Regulatory Programs," memorandum from Deputy Administrator Marcus Peacock, January 23, 2008.

would update its guidance to applicant tribes to reflect these changes consistent with the express congressional delegation of authority to eligible tribes.

VII. What Are the Anticipated Effects of the Proposed Reinterpretation?

A. Effects on Tribes that EPA Has Previously Found Eligible for TAS

There would be no effect on tribes that EPA has previously found eligible for TAS for the purpose of a CWA regulatory program.

B. Effects on New Tribal Applications

If EPA finalizes this proposed interpretive rule, then after the effective date TAS applications for CWA regulatory programs would be able to rely on the delegation from Congress as the relevant source of authority supporting their eligibility. The reinterpretation should thus streamline the TAS process for many tribes seeking eligibility to administer CWA regulatory programs. EPA anticipates that this proposed action, if finalized, could significantly reduce the time and effort for tribes to develop their TAS applications, and could encourage more tribes to apply for TAS for CWA regulatory programs.

EPA advises tribes that have already initiated TAS applications for CWA regulatory programs that the reinterpretation proposed in this action has not yet taken effect. The earliest it could take effect would be 30 days after EPA issues a final interpretive rule after reviewing and considering all comments received during the public comment period (see **DATES** section at the beginning of this document). All TAS applications will be processed under the existing statutory interpretation and the current regulations and guidance noted above, unless and until EPA issues a final interpretive rule. Such tribes can, at their option, ask EPA to suspend action on their current CWA applications for regulatory programs pending a potential final interpretive rule, but EPA cannot guarantee whether or when this proposal will be finalized.

C. Effects on EPA-Approved State Programs

EPA's proposal would have no effect on the scope of existing state regulatory programs approved by EPA under the CWA. Generally speaking, civil regulatory jurisdiction in Indian country lies with the federal government and the relevant Indian tribe, not with the states. *See, e.g., Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998). Therefore, in the absence of an express demonstration of authority by a state for such areas, EPA has generally excluded Indian country from its approvals of state regulatory programs under the CWA.

The proposal relates solely to the exercise of jurisdiction by Indian tribes on their reservations; it would have no effect on the scope of existing CWA regulatory programs administered by states outside of Indian country. It would neither diminish, nor enlarge, the scope of such approved state programs.

There are uncommon situations where a federal statute other than the CWA grants a state jurisdiction to regulate in areas of Indian country. For example, in a few cases EPA has approved states to operate CWA regulatory programs in areas of Indian country where the states demonstrated jurisdiction based on such a separate federal statute. This proposal is not intended to address or affect such jurisdiction that other federal statutes provide to states.

Regulations already exist to address circumstances where a state or tribe believes that unreasonable consequences could arise or have arisen as a result of differing WQS set by states and eligible Indian tribes on common bodies of water. Section 518(e) of the CWA required EPA to provide a mechanism to address such situations. The Agency did so at 40 CFR 131.7, which establishes a detailed dispute resolution mechanism. This proposal does not affect that process; it would remain available as needed to address potential state/tribal issues.

VIII. Economic Analysis

This rule would entail no significant cost. Its only direct effect would be to reduce the administrative burden for a tribe applying to administer a CWA regulatory program, and to potentially increase the pace at which tribes seek such programs. See the discussion of administrative burden and cost in section IX.B. (Paperwork Reduction Act).

IX. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was, therefore, not submitted to the Office of Management and Budget (OMB) for review.

B. Paperwork Reduction Act (PRA)

EPA has submitted the information collection activities in this proposed interpretive rule to OMB for approval under the PRA. The Information Collection Request (ICR) document that EPA prepared has been assigned EPA ICR number 2515.01. You can find a copy of the ICR in the docket for this rule, and it is briefly summarized here.

As discussed in section II.B., EPA's regulations require that a tribe seeking to administer a CWA regulatory program must submit information to EPA demonstrating that the tribe meets the statutory criteria described in section II.A. EPA requires this information in order to determine that the tribe is eligible to administer the program.

This proposed interpretive rule would streamline the application by removing the current requirement for an applicant tribe to demonstrate its inherent regulatory authority, including

demonstrating that it meets the *Montana* test where relevant. As described in the ICR, this proposed rule would reduce the burden by an estimated 583 staff hours for a typical tribe, or 27 percent, and reduce the cost of an application to a typical tribe for salaries and contractor support by an estimated \$70,554 per tribe, or 39 percent.

Respondents/affected entities: Any federally recognized tribe with a reservation can potentially apply to administer a regulatory program under the CWA.

Respondent's obligation to respond: The information discussed in this rule is required from a tribe only if the tribe seeks to administer a CWA regulatory program. See EPA's regulations cited in section II.B of this notice.

Estimated number of respondents: The total potential pool of respondents is over 300 tribes with reservations. Although there are 566 federally recognized Indian tribes in the United States, the CWA allows only those tribes with reservations to apply for authority to administer programs. EPA estimates that about six tribes per year would apply for a regulatory program under this proposed rule, an increase from the current rate of four tribes per year. The pace of applications could increase after the first few years as tribes become more familiar with the post-rule process.

Frequency of response: Application by a tribe to be eligible to administer a CWA regulatory program is a one-time collection of information.

Total estimated burden: 9,642 tribal staff hours per year. Burden is defined at 5 CFR 1320.3(b). EPA's ICR analysis included all administrative costs associated with TAS applications even if some of the costs are not strictly information collection costs. EPA was unable to differentiate the information collection costs consistently and reliably from other administrative costs such as program development costs.

This estimate could overstate actual burden because (a) EPA assumed that all applications are first-time applications for CWA regulatory programs, and thus the tribes submitting them would be unable to rely on materials from previous applications for different regulatory programs; (b) EPA used a liberal estimate of the annual rate of tribal applications to ensure that the ICR does not underestimate tribal burden; and (c) EPA used a simplifying steady-state assumption in estimating annualized costs.

Total estimated cost: \$668,292, including staff salaries and the cost of contractors supporting tribal applicants. This action does not entail capital or operation and maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to EPA using the docket identified in the **ADDRESSES** section at the beginning of this rule. You can also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs via email to oira_submission@omb.eop.gov, Attention: Desk Officer for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after receipt, OMB must receive comments no later than **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. EPA will respond to any ICR-related comments in the final rule.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action affects only Indian tribes that seek to administer CWA regulatory programs.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action would not have federalism implications. It would not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

This proposed action would apply only to tribal governments that seek eligibility to administer CWA regulatory programs. Although it could be of interest to some state governments, it would not apply directly to any state government or to any other entity. As discussed in section VII.C., the action would have no effect on the scope of existing state regulatory programs approved by EPA under the CWA.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and state and local governments, EPA consulted with representatives of state governments to obtain meaningful and timely input for consideration in this proposal. On June 18, 2014, EPA invited ten national and regional state associations¹⁷ by

¹⁷ The National Governors Association, the National Conference of State Legislatures, the Council of State Governments, the Western Governors Association, the Southern Governors Association, the Midwestern Governors Association, the Coalition of Northeastern Governors, the Environmental Council of the States, the Association of Clean Water Administrators, and the Western States Water Council. In May and June 2015, EPA held additional

letter to a July 8, 2014, informational meeting at EPA in Washington, D.C. As a result of this meeting and other outreach, EPA participated in several follow-up meetings with interested associations and their members as well as certain individual states during the months of June – September, 2014. Records of these meetings and copies of written comments and questions submitted by states and state associations are included in the docket for this rule.

Some participants expressed concerns, which included: whether the proposal would affect the geographic scope of TAS under the CWA; whether there is adequate evidence of congressional intent; how the proposal would affect a state’s ability to dispute a TAS application; and how the proposal would affect the status of existing TAS applications. Some states also had questions about issues unique to their situations. EPA considered this input in developing the proposed rule, particularly in developing sections IV. and V.

EPA specifically solicits additional comment on this proposed action from state officials.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action has tribal implications because it would directly affect tribes seeking to administer CWA regulatory programs. However, it would neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. EPA consulted and coordinated with tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to permit them to have meaningful and timely input into its development. A summary of that consultation and coordination follows.

EPA initiated a tribal consultation and coordination process for this action by sending a “Notification of Consultation and Coordination” letter on April 18, 2014, to all 566 federally

informational meetings with the state environmental chiefs of the National Association of Attorneys General, members of the legal network of the Environmental Council of the States, and member states of the Western Governors’ Association.

recognized tribes. EPA contacted all federally recognized tribes, even though only tribes with reservations can apply for TAS under the CWA, because it is possible that additional tribes could acquire reservation lands in the future. The letter invited tribal leaders and designated consultation representatives to participate in the tribal consultation and coordination process. EPA held two identical webinars concerning this matter for tribal representatives on May 22 and May 28, 2014. A total of 70 tribal representatives participated in the two webinars, and tribes and tribal organizations sent 23 comment letters to EPA.

All tribal comments generally supported EPA's potential reinterpretation of section 518. Some comments expressed concerns about whether there would be adequate funding to help tribes administer CWA regulatory programs after they have TAS. EPA considered the tribal comments in developing this proposal, and will continue to consider tribal resource issues in its budgeting and planning process. However, EPA cannot assure tribes that additional funding will be available for a tribe to develop or implement the CWA regulatory program it seeks. A tribe choosing to administer such programs will need to carefully weigh its priorities and any available EPA assistance.

EPA specifically solicits additional comment on this proposed action from tribal officials.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe could disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

This proposed interpretive rule would not have potential disproportionately high and adverse human health or environmental effects on minority, low-income, or indigenous populations. This action would affect the procedures tribes must follow in order to seek TAS for CWA regulatory purposes and would not directly affect the level of environmental protection.

Dated: July 31, 2015.

Gina McCarthy,
Administrator.

[FR Doc. 2015-19351 Filed: 8/6/2015 08:45 am; Publication Date: 8/7/2015]